

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1741 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

AFSARBANU D/O ABDULMIYA MALANGMIYA & ANR.

Versus

MOHMEDMIYA SULEMANMIYA SHAIKH

Appearance:

MR BN KESHWANI for Petitioners

MR SK BUKHARI for Respondent.

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 28/10/96

ORAL JUDGEMENT

Rule. Mr.S.K.Bukhari, learned Advocate, waives service of the notice of Rule for the Respondent. By consent of the learned advocates appearing for the parties, the petition is finally heard today and the same shall stand disposed of by this judgment.

2. The petitioners have filed this Civil Revision

Application under S. 115 of the Code of Civil Procedure challenging the order dated 14.10.1996 passed by the learned 6th Extra Assistant Judge, Vadodara, in Civil Misc. Application No. 63 of 1996, whereby the learned Extra Assistant Judge dismissed the application of the petitioners and refused to condone the delay of 39 days that has occasioned in filing the appeal in the District Court.

3. The respondent herein filed Regular Civil Suit No. 911 of 1990 on 5.7.1990 against the present petitioners for possession of the disputed property on the plea that the suit property was gifted to him by Fazlubibi and Gulhasan. The petitioners appeared in the suit through one advocate Mr.I.B.Shaikh, and filed written statement on 20.10.1992. Thereafter the learned Advocate Mr.Shaikh filed a purshis before the learned trial Judge that he had served a notice to the petitioners and therefore, he may be permitted to retire from the suit as the advocate representing the petitioners - original defendants. He requested the court by the said purshis that notice be issued to the petitioners about his retirement. This purshis was filed on 12.12.1995, and thereon the learned trial Judge passed the order 'recorded'. No notice about retirement of the advocate was issued to the petitioners. Thereafter it appears that in absence of the petitioners and their advocate, the suit came to be decreed on 15.12.1995. The petitioners came to know about passing of the decree for possession only on 2.1.1996 when the respondent asked them to hand over vacant possession of the suit property. Therefore, they applied for the certified copy of the judgment and decree on the same day. According to the petitioners, they received the certified copy on 28.2.1996. It is the petitioners' case that the respondent is their first cousin and therefore, there was a talk for compromise between them as a result of which the respondent had accepted the petitioners as tenants of the suit property at a monthly rent of Rs.60/- and it was also further agreed that the petitioners shall give deposit of Rs.10,000/- to the respondent. It is the petitioners' case that inspite of this compromise arrived at between them and the respondent, the respondent initiated execution proceedings on 26.3.1996 being Regular Darkhast No. 45 of 1996, and the petitioners were served with the notice of the said Darkhast proceedings and thereafter they immediately filed Civil Appeal in the District Court at Vadodara. As there was delay of 39 days in preferring the appeal, the petitioners filed Civil Misc. Application No. 63 of 1996 for getting condoned the delay of 39 days that has

occasioned in preferring the appeal.

4. The respondent did not file any reply controverting the averments made by the petitioners in the application, explaining the reasons for the delay. The learned Extra Assistant Judge, inspite of their being no reply filed by the respondent controverting the averments made by the petitioners in the application, dismissed the application for condonation of delay by the impugned judgment, as stated above.

5. The learned Advocate representing the petitioners in Civil Suit No. 911/90 had not followed the provisions of O.3 R.4 of the C.P.Code. In the purshis which was filed by him, the learned Advocate Mr.I.B.Shaikh had requested the court to issue notice to the defendants, i.e. the present petitioners. Despite this request of the learned Advocate, no notice was issued to the petitioners by the learned trial Judge. It is surprising that after filing of the purshis on 12.12.1995, the ex-parte judgment came to be passed on 15.12.1995. It is an undisputed fact that the petitioners came to know about the ex-parte judgment on 2.1.1996 when they were informed by the respondent about the same and asked them to hand over vacant possession of the disputed property. The learned Extra Assistant Judge, without there being any affidavit controverting the averments made by the petitioners in the application for condonation of delay, has disbelieved the explanation offered by the petitioners regarding the reasons for the delay of 39 days. The learned Judge also disbelieved the affidavit filed by Babumiya Shaikh who was the uncle of the petitioners, and who had in support of the application for condonation of delay filed the affidavit. The approach of the learned Extra Assistant Judge is highly unreasonable and illegal. It is also apparent from the impugned order that even though there was no prayer to call for the record and proceedings of Civil Suit No.911 of 1990 and Regular Darkhast No. 45 of 1996, the learned Judge has called for the records and proceedings and decided the condonation application. The learned Extra Assistant Judge has failed to appreciate the legal provision contained in Order 8 R.5(2) of the CP Code wherein it is stated that if the allegations made in the application are not controverted, the same are to be treated as admitted. Admittedly, the respondent had not filed any reply controverting the averments made in the application for condonation of delay. Therefore, it goes without saying that he had admitted the averments made in the application. In the application, the petitioners have shown sufficient cause for the delay in preferring

the appeal before the District Court.

In the case of COLLECTOR, LAND ACQUISITION, ANANTNAG AND ANOTHER vs. Mst.KATIJI AND OTHERS, AIR 1987 SC, 1353, the Supreme Court has held that while condoning delay courts should adopt liberal approach on the principles laid down therein, which are as under :

- "1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. Every day's delay must be explained, does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

6. If the above principles are borne in mind, then in the present case, the petitioners have shown sufficient cause for condonation of delay of 39 days in filing the appeal before the District Court. It cannot be said that the petitioners had abandoned their right to defend the suit and the right to prefer appeal. On the contrary, they were misled by the talks for compromise which was to be arrived at between the parties.

Therefore, there was some delay in preferring the appeal, which cannot be said to be inaction or want of bonafides on the part of the petitioners. In my opinion, bearing in mind the principles laid down by the Supreme Court in Mst.KATIJI's case (supra), the petitioners have shown sufficient cause for condonation of delay. Therefore, the learned Assistant Judge has committed illegality and material irregularity in not exercising the jurisdiction properly. Therefore, the present CRA deserves to be allowed.

7. Mr.B.N.Keshvani, Id. Advocate for the petitioners has requested that till the appeal is admitted and stay is granted, further proceedings in Regular Darkhast No. 45 of 1996 be stayed.

8. In view of the foregoing discussion, the CRA is allowed. Judgment and order dated 14.10.1996, passed by the learned 6th Extra Assistant Judge, Vadodara, dismissing Civil Misc. Application No. 63 of 1996 is hereby quashed and set aside. The delay of 39 days in filing the appeal before the District Court is condoned. The District Court is directed to register the appeal and dispose of the same in accordance with law. Rule is made absolute with no order as to costs.

Further proceeding in Regular Darkhast No. 45 of 1996 in execution of the decree passed in Regular Civil Suit No. 911 of 1990 by the learned Civil Judge (SD), Vadodara, is stayed till the appeal is registered and appropriate order therein is passed by the District Court, Vadodara.

abraham.